

Docket No. 242,351

The Administrative Law Judge (ALJ) found the claimant sustained a 100 percent work disability based upon a 100 percent wage and task loss. The ALJ further ordered respondent to provide claimant with in-home nursing assistance three days a week up to two hours per day to assist claimant with his daily living activities.

The claimant requests review of the following: (1) whether the ALJ erred in not finding the claimant suffered a permanent total disability; (2) whether the ALJ erred in not providing in-home nursing assistance for eight hours a day; (3) whether the ALJ failed to determine reasonable attorney fees; and, (4) whether respondent should provide and pay for transportation in a handicapped accessible vehicle or in the alternative, modify the claimant's vehicle to make it handicapped accessible.

Respondent argues claimant has neither requested transportation to medical appointments nor has claimant demonstrated he has the ability to drive a vehicle modified for his condition. Accordingly, respondent argues claimant has failed to meet his burden of proof on those issues. Respondent further argues that the physician treating claimant for his spinal cord injury has determined appropriate in-home nursing care would consist of three times a week for two hours per visit. Respondent concludes claimant has failed to meet his burden of proof that he is permanently and totally disabled and requests the Board to affirm the ALJ's Award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets out findings of fact that are detailed, accurate and supported by the record. It is not necessary to repeat those findings herein. The Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein except as noted.

The claimant suffered a fall at work which resulted in multiple injuries, most significantly a traumatic brain injury as well as a T-11 vertebral column fracture with secondary spinal cord injury with T-11 paraplegia. Dr. Blake C. Veenis performed a court ordered examination of claimant and opined that as a result of his multiple injuries suffered in the fall the claimant suffered a 90 percent whole person functional impairment.

Dr. Veenis testified claimant was 100 percent disabled from a return to work standpoint. The ALJ summarized the doctor's testimony in the following fashion:

Dr. Veenis stated that he did not feel [sic] that the claimant had the capabilities of being retrained for employment nor any transferable skills to meet the criteria of sedentary desk level work. He has not achieved a level of functional independence that would allow him to return to this type of work either. Further, from a brain injury standpoint, he believed the claimant was only capable of performing only very simple type of desk level work. Dr. Veenis stated that he believed, at this time, the claimant is not capable of returning to any type of work and he does not anticipate in the future that the claimant will ever be capable of returning to any type of work.

Dr. Veenis determined that the claimant is 100% disabled from a return to work standpoint.¹

The claimant's vocational expert, Mr. Jerry Hardin, opined claimant was essentially and realistically unemployable. Mr. Hardin noted claimant was functionally illiterate and had performed unskilled manual labor in his past employment. Mr. Hardin testified:

Q. Ultimately your opinion was that he has a 100 percent loss and is essentially and realistically unemployable. What do you mean when you say that?

A. Basically if you look at the open labor market where he lives and works, his restrictions, my evaluation of his education, training, and work experience, I don't believe that realistically that there is any company that would be interested in hiring him or that he would be able to perform any job for gainful employment.²

K.S.A. 44-510c(a)(2) (Furse 1993) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

The terms "substantial and gainful employment" are not defined in the Kansas Workers Compensation Act. However, the Kansas Court of Appeals in *Wardlow*³, held: "The trial court's finding that Wardlow is permanently and totally disabled because he is essentially and realistically unemployable is compatible with legislative intent."

Both Dr. Veenis and the vocational expert concluded that as a result of claimant's work-related injuries he was essentially and realistically unemployable. The Board finds the claimant has met his burden of proof to establish that he is permanently and totally disabled and accordingly, the ALJ's Award is modified to reflect claimant has suffered a permanent and total disability.

The claimant requested that he be provided with daily in-home nursing assistance. The claimant offered the testimony of his personal physician that such care was necessary.

¹ ALJ Award (Sep. 9,2004) at 3.

² Hardin Depo. at 13.

³ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

The ALJ found the testimony of the court ordered independent medical examiner more persuasive that claimant's current need for in-home nursing assistance could be met by three times per week one to two hour per day visits. The Board agrees and affirms.

Claimant requested respondent provide a handicapped accessible vehicle for his trips to doctors' appointments or that claimant's vehicle be made handicapped accessible. Dr. Veenis testified claimant should be able to get in and out of his motor vehicle by himself. And it does not appear that claimant has become qualified and licensed to drive a modified vehicle. The Board finds claimant has not met his burden of proof to establish that he requires a handicapped accessible van nor modification of his motor vehicle.

At the regular hearing, the claimant's attorney offered as exhibits an itemized fee statement and her contract of employment with claimant. The matter was discussed in the following colloquy:

THE COURT: Are there any other issues?

MR. JURCYK: Not that I'm aware of, Your Honor.

MS. GILMORE: Simply our attorney fee statement and contract, but I understand I'll mark that as an exhibit and submit it today.

MR. JURCYK: There's also a lien by prior counsel.

MS. GILMORE: That's correct.

MR. JURCYK: I don't know if the Court will tend to rule on that or not.

THE COURT: Normally what I put in the award is that there's a lien filed, date it was filed and that it will be set for hearing if requested by any of the parties, because usually it's resolved once the case is resolved between the current counsel and prior counsel.⁴

In the award, the ALJ approved the claimant's contract of employment subject to the provisions of K.S.A. 44-536 and noted that because there was an attorney lien filed by claimant's previous counsel the matter of fees would, upon request, be set for hearing. K.S.A. 44-536(h) provides that disputes regarding attorney fees are to be addressed first by the ALJ. Accordingly, the request for attorney fees is remanded to the ALJ for further proceedings, if necessary, regarding the attorney fees.

⁴ R.H. Trans. at 8-9.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated September 9, 2004, is modified to reflect that as a result of his work-related injuries the claimant is permanently and totally disabled and affirmed in all other respects.

The claimant is entitled to 69.86 weeks temporary total disability compensation at the rate of \$363.86⁵ per week or \$25,419.26 followed by permanent total disability compensation at the rate of \$363.86 per week not to exceed \$125,000 for a permanent total general body disability.

As of February 11, 2005, there would be due and owing to the claimant 69.86 weeks of temporary total disability compensation at the rate of \$363.86 per week in the sum of \$25,419.26 plus 244.57 weeks of permanent total disability compensation at the rate of \$363.86 per week in the sum of \$88,989.24 for a total due and owing of \$114,408.50, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$10,591.50 shall be paid at \$363.86 per week until fully paid or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of February 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Linda P. Gilmore, Attorney for Claimant
John D. Juryck, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁵ The ALJ used the incorrect benefit rate.